Citizens Utility Board, Citizens
Action/Illinois and AARP
-vs-
Illinois Energy Savings Corp. 08-0175
d/b/a U.S. Energy Savings Corp.

Complaint pursuant to 220 ILCS 5/19-110 or 19-115.

ADMINISTRATIVE LAW JUDGE'S RULING

PROCEDURAL BACKGROUND

On August 21, 2008, The Citizens Utility Board ("CUB") filed a Motion to Compel Production of Documents and Request Leave to File Supplemental Direct Testimony. CUB attempted to file the Motion on August 12, 2008 (and did serve the Motion on all parties on that date), but the filing was not registered by the Commission's electronic filing system. Neither CUB nor the other participants in this proceeding realized, until August 21, that the filing had not been perfected. As a result, Respondent, Illinois Energy Savings Corp., d/b/a U.S. Energy Savings Corp. ("US") filed a Response to the Motion on August 15, 2008, and CUB filed a response (for clarity in this Ruling, a "Reply") on August 18, 2008.

After becoming aware on August 21, 2008 that its electronic motion filing had not been perfected, CUB notified the other parties to this proceeding. Those parties agreed, with the concurrence of the Administrative Law Judge, that the previously filed Response and Reply need not be re-filed or altered. Consequently, when the Motion was filed and accepted on August 21, the record necessary for resolving the Motion was deemed complete.

The Motion requests that US be compelled to respond by August 22, 2008 to CUB Data Requests ("DRs") 2.18, 2.52 and 2.59, each contained in the second set of DRs CUB propounded to US. CUB additionally asks that US be compelled to respond to CUB's third set of data requests by the same date. Also, CUB conditionally requests leave to file supplemental direct testimony, depending on whether data responses are compelled and when they are received. CUB acknowledges that the procedural schedule in this case might need to be modified to accommodate a supplemental filing.

MOTION TO COMPEL

Under Section 200.360 (c) of the Commission's Rules of Practice, 83 Ill. Adm. Code 200.360(c), written discovery requests must be utilized "in the manner contemplated by" the Illinois Code of Civil Procedure and the Rules of the Supreme Court of Illinois. Supreme Court Rule 201(b)(1) authorizes discovery of "any matter

relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party."

Although neither party to this discovery dispute cites the foregoing rules, their arguments reflect the essential test those rules create. CUB relies on the familiar principle that information is discoverable if it is reasonably calculated to lead to admissible evidence. CUB Reply at 2. As is often the case in discovery disputes, the parties' arguments here principally address the "reasonably calculated" component of the discoverability principle CUB cites. As is also customary, the "relevance" of the requested information is employed by the parties here as a surrogate for what is "reasonably calculated." Thus, the principles employed by the parties and the text of the Supreme Court Rule are in harmony. Accordingly, the discoverability of the information sought by the DRs involved here is contingent upon the relevance of that information to the allegations of the Complaint and the responses in US's Answer.

DR. 2.18

This DR refers to certain independent contractors used by US in Illinois. It requests that the length of service of such contractors be quantified within parameters set forth in the DR. It also requests the resumes and similar "pertinent information relating to [US's] decision to enter into an agreement with the contractor." Additionally, the DR indicates that if production of responsive information regarding contractor background is "too burdensome," CUB would review it at US's offices.

The parties agree that if the information sought by DR 2.18 is germane to the Complaint filed in this proceeding, it would be because it concerns the fraudulent conduct alleged in paragraph 19 of the Complaint - conduct which (if it occurred) would ostensibly support the claim of mismanagement presented in paragraph 25 of the Complaint. However, the parties do not agree that the information is discoverable for that purpose.

Subsection (a). With respect to its contractors' length of service, US argues that CUB has failed to show how such information would be "reliable as a predictor for the types of conduct alleged in paragraph 19." US Response at 2. The principal flaw in this argument is that it challenges the relevance of the requested information by speculating about how CUB would specifically use that information in testimony or at hearing (*i.e*., as a predictor). CUB may well have other intentions (*e.g*., to show that company management permitted contractors to continue improper conduct over several months, or to prove a rapid contractor "churn" rate). At the discovery stage, however, it does not matter. For discovery, all that is necessary is a reasonable connection between CUB's claim (mismanagement) and the requested information.

US also objects that CUB has not limited its length-of-service inquiry to those contractors implicated in the misconduct alleged in paragraph 19. US Response at 2-3. Implicitly, US is again presuming the purpose of CUB's request and declaring that purpose irrelevant. It may well be that CUB would, for example, use the total contractor

population as a denominator in order to express alleged mismanagement as a percentage. Again, the relevance test for discovery purposes is only whether the requested information is reasonably related to the claims asserted.

However, there is a potential ambiguity in CUB's request for length-of-service data. CUB DR 2.18(a) requests that the data be organized by the number of service days per contractor. Whether the data request addresses total days of service or consecutive days is not clear to the ALJ. Contractors, in contrast to employees, may not provide service on consecutive days, or they may provide contract services to multiple enterprises during a given time period. US's independent contractor agreements may clarify these matters, but they are not before the ALJ. Accordingly, US may organize its answer to 218(a) in the manner that, in US's judgment, best reflects the service commitments of its contract sales personnel.

In sum, US is directed to provide information responsive to DR 2.18(a), as described above. US's information must be delivered to CUB before the close of business on August 28, 2008.

Subsection (b). Regarding contractor resumes and similar recruitment materials, US states it has already provided CUB with copies of its standard independent contractor agreements, which elicit indentifying information about the contractor and authorize a criminal background check. US contends that these documents "suffice to illustrate the types of information that [US] obtains at the outset of a contactor's service, without…disclosing each contractor's personal information."[1] Response at 2.

CUB rejoins that its data request is not aimed at US's formal contractor recruitment policies and procedures, but at whether, and how, US actually implemented those policies and procedures. CUB Reply at 3. This is a valid distinction, and both categories of information – formal management policies and actual implementation – are reasonably related to CUB's mismanagement allegations. Thus, even if, as US asserts, previously provided documents "suffice" to illustrate formal management policies, they would not (as described by US) address implementation. Moreover, while information requests can become unnecessarily cumulative, it is not within the province of the party receiving the requests to determine what should suffice for the requesting party's litigation plans.

US also presents the objection it made to subsection 2.18(a) (discussed above) that CUB's request is not limited to those specific contractors involved in purported misconduct. Again, US makes implicit assumptions about how the requested data will be used at hearing and dismisses the relevance of that use. But, in order to illustrate management failure, CUB may be exploring a statistical analysis similar in form to the one US presents in response to disputed DRs 2.52 and 2.59 here. US Response at 3-

[1] Although US mentions "personal information" here, its objection to CUB's DR is not based on contractor confidentiality. Consequently, this Ruling does not address confidentiality issues. US remains free to seek confidentiality protection in such contexts as data release, evidentiary filings and hearings transcripts.

4. Information confined to those contractors that have (as US says) "done anything wrong" could preclude such analysis.

In sum, US is directed to provide information responsive to DR 2.18(b). That DR contemplates that such information would either be produced to CUB or made available for inspection at the offices of US (or, implicitly, its attorneys). US may choose either alternative. US's information must be delivered or made available to CUB before the close on business on August 28, 2008.

DR's. 2.52 & 2.59

DR 2.52 requests dollar amounts (total and per contractor) of bonuses provided to US's Illinois contractors. DR. 2.59 seeks the total dollar amount of incentive paid to those contractors. (The precise distinction between bonuses and incentive is not apparent on the face of these DRs, but may be known by the parties.)

US maintains that it has already provided "bonus eligibility information and amounts" and "detailed information as to rules and procedures governing the awarding of commissions, bonuses and incentive awards." Response at 3. Furthermore, US avers, CUB has not explained how total compensation paid to contractors will lead to admissible evidence.

CUB retorts that "[e]ven more relevant than the Contractor Agreements, bonus structure and incentive compensation *policies* are the actual practices resulting from these policies." Reply at 3 (emphasis in original). CUB posits that in actual practice "it may be that no contractors have ever actually received bonuses or other incentive compensation, or it may be a matter of course." *Id*.

CUB's distinction between formal policy and actual practice remains valid. With respect to the bonus data sought by DR 2.52 in particular, the relevance of rewards conferred on contractors ultimately implicated in misconduct (as well as the comparable rewards for contractors not so implicated) is patent. The "total dollar amount" of paid bonuses is simply the sum of those per-contractor amounts.

DR 2.59 is a different story, however. Although the "total dollar amount" of paid incentive is associated with implementation, rather than formal company policy, the relevance of that amount to the specific categories of misconduct alleged in paragraph 19 of the Complaint, or to the general allegation of insufficient management in paragraph 25, is not discernible. It is one thing to speculate about, then criticize, a particular use of requested data that CUB might attempt at hearing (as US has done, above). It is another to perceive no relationship between the requested data and CUB's allegations and US's defenses. The ALJ does not now perceive a relationship. That does not mean that the requested data will never acquire relevance as this litigation unfolds. A future discovery request is not precluded by this Ruling. But as the case stands now, a judgment call is needed to resolve the parties' dispute, and the ALJ does

not see a connection between the "total dollar amount" of paid incentive and company mismanagement.

In sum, US is directed to provide information responsive to DR 2.52, but is not directed to provide information responsive to DR 2.59. US's information must be delivered to CUB before the close on business on August 28, 2008.

Accordingly, the Motion to compel is granted with regard to DRs 2.18 and 2.52 and denied with regard to 2.59. US must respond to DRs 2.18 and 2.52 before the close of business on August 28, 2008.

CUB'S Third Set of DRs

CUB issued its third set of DRs on August 7, 2008. Many of those DRs expressly refer to US's responses to CUB's second set of DRs, served by US on July 29, 2008, one day after the date on which responses were due under 83 Ill. Adm. Code 200.410(b). Other DRs in the third set do not refer to US's second set of responses, at least expressly, and some are requests for admission or denial rather than for information.

Under Section 200.410(b), US's responses to CUB's third DR set would be due 28 calendar days after service – that is, on September 4, 2008. Motion at 8. CUB requests here that US be compelled to provide its responses to the third DR set by August 22, the same date on which CUB seeks responses to DRs 2.18. 2.52 and 2.59, discussed above. CUB notes that, under the extant schedule in this docket, its direct testimony is due to be filed on August 28, 2008, and that if responses to its third DR set are not provided until September 4, CUB will be unable to incorporate that information in its direct testimony. In effect, CUB seeks to have US's response time to the third DR set shortened to 15 calendar days.

CUB's rationale for accelerating US's response time to the third DR set is that a "pattern of delay" by US has "prejudiced CUB's ability to turnaround discovery requests and thus to prepare its direct case in time." Motion at 8. In support of these assertions, CUB emphasizes, among other things, that US's response to CUB's second DR set was a day late, voluminous and still being supplemented on August 7, 2008. *Id*. US does not specifically respond to CUB's request for accelerated responses to the third DR set, but does object to CUB's characterization of US's conduct as dilatory. Response at 4.

CUB could have, but did not, move to expedite US's responses to the third DR set at the time those DRs were served. Insofar as CUB's request is premised on the notion that US's prior conduct warrants a "penalty," in the form of accelerated responses to the third DR set, such penalty will have greater impact today, 14 days after service of the DRs, than it would have had earlier. US will have thus far relied on the 28-day turnaround time in Section 200.410(b). Responses one day after the due date, and supplements thereafter (with information that may or may not have been available on

the due date), are not sufficiently egregious to justify the "penalty" of abrupt acceleration today.

To the extent that CUB seeks acceleration due to the prejudicial impact of delayed responses, CUB's arguments still do not warrant expedition of US's answers to the third DR set. Even if US had responded to the second DR set a day earlier, the volume of those responses would presumably have been the same. And supplementation of those responses on August 7 did not prevent CUB from serving the third DR set on that date. Moreover, discovery responses will almost always suggest additional discovery, particularly in complex litigation. At some point, a party will inevitably have to produce testimony with imperfect knowledge. If the quality of the evidentiary record or the rights of a party are thereby compromised, schedule revisions or supplemental discovery, rather than abruptly accelerated responses, can provide a remedy later in the proceeding.

In sum, the Motion for accelerated responses to CUB's third DR set is denied. US must respond to CUB's third DR set before the close of business on September 4, 2008, the due date established by operation of 200.410(b). CUB is not precluded by this Ruling from requesting an opportunity to file supplemental testimony after September 4, 2008. Additionally, if US does not provide responses to the third DR set by September 4, and if CUB files a motion to compel responses, that motion should contain specific recommendations for sanctions.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL TESTIMONY

CUB requests leave to file supplemental direct testimony in the event that information responsive to the disputed DRs is not provided by today, August 22, 2008. Because the filing of the Motion was not perfected until August 21, this Ruling obviously cannot compel US to produce information by CUB's preferred date. Instead, as set forth above, US is directed to serve information responsive to CUB DRs 2.18 and 2.52 before the close of business on August 28, 2008.

CUB should be accorded an opportunity to use the information in US's tardy discovery responses in direct testimony. Accordingly, CUB shall notify all parties and the ALJ, via email, by the close of business on September 3, 2008, if it wants to file supplemental direct testimony. Such testimony shall be limited to presentation or use of the information received in response to DRs 2.18 and 2.52, and any inferences, arguments or conclusions associated with that information (and with other reasonably related information).

If, within 48 hours after CUB's notification, CUB and the parties can agree to a schedule for filing and responding to CUB's supplemental direct testimony, AND if that agreed schedule will not disturb the present case schedule, CUB need only notify the ALJ of such agreement and the parties can proceed to implement that supplemental filing schedule. If, however, all parties cannot agree to a supplemental filing schedule in 48 hours, OR if agreement is reached but would necessitate alteration of the present

case schedule, CUB shall request a status hearing during which the ALJ will consider all suggested scheduling proposals and revisions.

David Gilbert, ALJ
August 22, 2008.